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TALKING POINTS ON THE APPLICABILITY OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO ANTARCTICA AND THE GLOBAL COMMONS

Why Exec Order necessary. Need evidence...

o o o The National Environmental Policy Act (NEPA) applies to federal actions in the Antarctic and in the global commons as a Matter of Law. Congressional history and the clear language of the statute support this proposition.

o o o The Departments of State and Defense and the National Science Foundation, among others, applied NEPA to federal actions in Antarctica and the global commons from 1970 to the issuance of EO 12114 in 1979. No particular problems were noted as a result of NEPA applied to these actions.

o o o NEPA can be applied to federal actions in Antarctica and in the global commons in a reasonable manner, without jeopardy to foreign policy or national security concerns. NEPA and the CEQ implementing regulations are flexible, and the courts have been deferential to the agencies in general and sensitive to foreign policy and national security concerns in particular.

o o o Application of NEPA to U.S. actions in the Antarctic is consistent with the international scheme for environmental protection in Antarctica, and with the application of other US law to Antarctica.

o o o Similarly, application of NEPA to the global commons is consistent with historical interpretations of NEPA, with the application of other environmental laws, and with international law.

o o o Agenda 21, the Action Plan developed at UNCED, supports the application of NEPA to Antarctica and the Global Commons.

specifics

o o o Public policy considerations weigh on the side of applying NEPA in the Antarctic and in the global commons

o o o Campaign commitments support the application of both NEPA and the Endangered Species Act to actions outside of the territory of the United States

o o o The environmental community will be highly critical of a decision to appeal <u>EDF v. Massey</u>.

o o o Congress is likely to reintroduce amendments to apply NEPA to all federal actions abroad if the administration appeals <u>EDF v. Massey</u>.

degree of support

THE NATIONAL ENVIRONMENTAL POLICY ACT'S APPLICATION TO ANTARCTICA AND THE GLOBAL COMMONS

THE NATIONAL ENVIRONMENTAL POLICY ACT APPLIES TO FEDERAL ACTIONS IN THE ANTARCTIC AND IN THE GLOBAL COMMONS AS A MATTER OF LAW

Congressional Intent

The National Environmental Policy Act (NEPA) requires federal agencies to prepare environmental impact statements for proposed "major Federal actions significantly affecting the quality of the human environment".[1] Nothing in NEPA's language restricts this requirement to federal actions taking place within the confines of U.S. territory. In fact, legislative history contains substantial evidence that Congress had the global environment in mind when they drafted NEPA. For example, the 1969 Congressional White Paper prepared in the process of developing the legislation that became NEPA stated that:

> "[a]lthough the influence of U.S. policy will be limited outside its borders, the global character of ecological relationships must be the guide for domestic activities. Ecological considerations should be infused into all international relations."[2]

The House Merchant Marine and Fisheries Committee in a report on the proposed legislation observed that, "It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross state lines."[3]

Shortly after the law's passage, Congressional committee members who had been involved in NEPA's enactment stated that the EIS requirement was meant to apply to federal agency actions and wherever they took place. In responding to a suggestion made during an oversight hearing that perhaps NEPA did not apply fully to the international environmental effects of agency actions, a Merchant Marine and Fisheries Committee report contained the following admonition:

"Stated most charitably, the committee disagrees with this

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1. 42 U.S.C. §4332(2)(C).

2. 115 Cong. Rec. 29,067.

3. H.R. 91-378 (1969).

interpretation of NEPA. The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context."[4]

When, in 1978, Congress was debating proposed legislation to exempt the Export-Import Bank from NEPA, Senator Muskie stated that he was amazed at:

"[b]ureaucratic descriptions of legislative intent 180 degrees oppose from what I know the actual legislative intent to have been. The thought never occurred to me that somewhere down the line nine years later the argument would be made that because major Federal actions impacting on areas outside the United States were not specifically referenced that, therefore, they were excluded."[5]

And recently, Congressman Studds, Chair of the committee with jurisdiction over NEPA in the House of Representatives, has written that:

"Within the House of Representatives, the Committee on Merchant Marine and Fisheries has exclusive legislative jurisdiction over NEPA. Since enactment of NEPA, the Committee has taken the position that NEPA applies to federal activities occurring outside the United States, including Antarctica."[6]

Federal Agencies, Including the Department of Defense and the Department of State, Interpreted NEPA to Apply to Areas Outside the Jurisdiction of Another Nation During the 1970's.

The Council on Environmental Quality (CEQ), the agency which oversees the implementation of NEPA throughout the executive branch, has consistently maintained that NEPA applies to environmental impacts of federal actions in areas outside the jurisdiction of any country. The Council's 1973 Guidelines for

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4. Administration of the National Environmental Policy Act, Merchant Marine and Fisheries Committee, H.R. Rep. No. 316, 92nd Cong., 1st Sess. 53 (1971).

5. Export-Import Bank Amendments of 1978: Hearings before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Session (1978), p. 220. The bill was ultimately defeated.

6. Letter from Gerry E. Studds, Chairman, Committee on Merchant Marine and Fisheries, to the Honorable Stuart M. Gerson, Acting Attorney General, Department of Justice (February 18, 1993).

the preparation of environmental impact statements (EISs) required the assessment of both the national and "international environment"[7], and all of CEQ's directives to the federal agencies interpreted NEPA to apply to U.S. actions taking place in Antarctica and the global commons.[8]

The specific issue of NEPA's application to the Antarctic and the global commons was first addressed by the Department of State in 1970 in response to CEQ's initial guidelines for implementing the EIS requirement. In a legal memorandum prepared by the Office of Legal Advisor, the Department of State concluded that:

> "The Act should be interpreted as applying to federal actions occurring in areas outside the jurisdiction of any other State (i.e. the high seas, Antarctica or outer space) . . . . [t]here is much history to suggest that the Congress had the oceans and their resources very much in mind, and application of the Act to actions occurring outside the jurisdiction of any State, including the United States, would not conflict with the primary purpose underlying this venerable rule of interpretation [i.e., the Foley doctrine[9]] - to avoid ill-will and conflict between nations arising out of one nation's encroachments upon another's sovereignty. Furthermore, the Act's provisions . . . can be applied sensibly to many activities taking place beyond the territory of any nation. There are at least three such general areas: The high seas, outer space, and Antarctica.[10]" (emphasis added)

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[7]. 40 C.F.R. §1500.8(a)(3)(i)(1973).

[8]. "Legal Advisory Committee Report to the President's Council on Environmental Quality", pp. 13-17 (December 1971); "Council Advisory Memorandum #3, NEPA's Global Perspective, March 13, 1975"; "Memorandum to Heads of Agencies: Application of the National Environmental Policy Act to Federal Activities Abroad", Charles Warren, Chairman, Council on Environmental Quality (January 19, 1978).

[9]. The "Foley doctrine" stands for the proposition that American law does not apply in another country, absent an express intent of Congress in the statute itself to the contrary. Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).

[10]. Memorandum from Christian A. Herter, Jr., Special Assistant to the Secretary for Envir. Affairs, Bur. of Int' Scient. and Tech. Affairs, Dept. of State, to Russell Train, chairman, Council on Environmental Quality, on Department to State and AID Comments on Draft Guidelines Pertaining to P.L. 91-190, Section 102(2)(C), in Appendix to Hearings on the

The Department of Defense (DOD) began its implementation of NEPA by interpreting it to apply to actions in areas not under the jurisdiction of another nation. In its initial NEPA regulations published in 1971, and continuing throughout most of the decade, DOD's NEPA regulations for the Office of the Secretary of Defense, the Military Departments, the Joint Chiefs of Staff, Unified and Specified Commands, and Defense Agencies, contained the following provisions:

> "<u>Geographical location of actions.</u>
> (1) Environmental statements are required for actions . . . conducted anywhere in the world, except when conducted in, or party in, areas which are in or under the jurisdiction of a nation other than the United States. In these latter cases, the DOD component responsible for the action shall provide as the ASD (H & E) full particulars, a recommendation as to whether or not a statement should be prepared, reasons for the recommendation, and an assessment of the effect of a statement on U.S. foreign relations."[11]

> "<u>Projects and continuing activities.</u>
> (v) Combat or combat-related activities in a combat zone, riot control activities, and other emergency activities do not require environmental statements. However, the intentional disposal of hazardous substances or of other materials <u>in the oceans</u> shall not be considered to be combat or combat-related activities."[12] (emphasis added)

The National Science Foundation also published procedures applying NEPA to proposed actions as they affect "both the national and international environment."[13] Specifically, the NSF NEPA regulation published in 1974 stated that:

> "As appropriate, NSF shall prepare program statements and statements on a group of interrelated projects. For instance, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., <u>the Antarctic</u>), or environmental impacts that are generic or

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Administration of the NEPA Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 91st Cong. 2d Sess. 546 (1970).

11. 32 C.F.R. §214.5(b)(1)(1972).

12. 32 C.F.R. §214.5(b)(v)(1972), cited in <u>People of Enewetak v. Laird</u>, 353 F.Supp. 811, 819 (D. Hawaii 1973).

13. 45 C.F.R. §640.5(b)(3)(1974).

common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program, project, or chain of contemplated projects."[14]

Virtually all early legal and academic commentary supported these interpretations of NEPA. While there was considerable disagreement as to whether NEPA applied to federal actions taking place within another country, legal analysis concluded that NEPA applied to actions occurring in the global commons[15]

Executive Order 12114

In 1978, the issue of NEPA's applicability to environmental impacts of federal actions in other countries was the subject of litigation, proposed rulemaking by CEQ, and a proposed Congressional amendment. However, the issue of whether NEPA applies to actions in Antarctica or in the global commons was not the subject of particular attention at the time.

On January 4, 1979, President Carter signed Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions". The executive order was written to "further the purpose" of NEPA, although it is not based upon NEPA, as a matter of law. It does not create a cause of action in the courts.[16] The Executive Order encompasses "major federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica)". The two major differences between the application of NEPA and EO 12114 are the public involvement and judicial

why this phrase? It depends only on jurisdiction

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[14]. National Science Foundation, Circular No. 909, Rev. No.2, §6(b)(3) (February 28, 1974); 45 C.F.R. §640.3(e)(1974, 1977).

[15]. See Committee on Environmental Law of the Section on International and Comparative Law of the American Bar Association, Opinion on the International Scope of NEPA (July 1971); Comment, "Renewed Controversy Over the International Reach of NEPA," 7 Env. L. Reporter 10205 (Nov. 1977). Memorandum for the Chairman from Gary Widman, CEQ General Counsel, March 13, 1975; Robinson, Nicholas, "Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: the Unfulfilled Mandate of NEPA", Vol. 7 Intern. Law and Policies of Env. Protection 157 (1974).

[16]. EO 12114, Section 3-4.

enforcement. NEPA implementation includes both; EO 12114 involves neither.[17]

Although an executive order cannot constitutionally supplant the legal reach of a statute, due to the wording of EO 12114, the interagency tensions at the time, and the advent of the Reagan administration, many agencies took the position from the early 1980's onward that NEPA no longer applies to actions in the Antarctic and the global commons. However, neither the courts nor Congress did anything which would sustain the conclusion that the statute's reach had somehow been narrowed from its original scope in 1970.

THE NATIONAL ENVIRONMENTAL POLICY ACT CAN BE APPLIED TO FEDERAL ACTIONS IN ANTARCTICA AND IN THE GLOBAL COMMONS IN A REASONABLE MANNER, WITHOUT JEOPARDY TO FOREIGN POLICY OR NATIONAL SECURITY CONCERNS. THE STATUTE AND IMPLEMENTING REGULATIONS ARE FLEXIBLE, AND THE COURTS HAVE BEEN DEFERENTIAL TO THE AGENCIES IN GENERAL AND SENSITIVE TO FOREIGN POLICY AND NATIONAL SECURITY CONCERNS IN PARTICULAR.

NEPA sets forth a national policy in which environmental considerations are to be part of federal decisionmaking. NEPA directs the federal government to use all "practicable means, consistent with other essential considerations of national policy",[18] and to implement the policies contained in the Act "to the fullest extent possible".[19] Reflecting this intent to ensure consideration of the environment as one of a number of factors in decisionmaking, the procedural requirements of NEPA have been interpreted by both CEQ and the courts to allow for the flexibility necessary to integrate the NEPA process into agency efforts to achieve other important national objectives.

Freedom of Information Act Exemptions

NEPA provides for the availability of environmental documents pursuant to the requirements of the Freedom of

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17. In fact, it was suggested that, "The result [of interagency disagreement] was the release of a patchwork Executive Order which seems unlikely to achieve the objectives of any of the principals. Given that the courts will likely factor the Executive Order very lightly, if at all, when next faced with the question of the international reach of NEPA, the Order has done little to clear the fog surrounding this important issue." "President Orders Environmental Review of International Actions", 9 Envtl. L. Rep. 10,011 (January, 1979).

18. 42 U.S.C. §4331(b).

19. 42 U.S.C. §4332.

Information Act (FOIA). Thus, all of the exemptions available to agencies under FOIA are, by law, applicable to NEPA documentation. These exemptions include matters which are:

--- classified in the interest of national defense or foreign policy;
--- specifically exempted from disclosure by another statute;
--- privileged or confidential trade secrets and commercial or financial information;
--- law enforcement information.[20]

Classified Information

The CEQ regulations implementing NEPA provide that:

> "Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public."[21]

The courts have been very sensitive to the relationship between NEPA and national security concerns. While not carving out a blanket "national security exemption", they have, when faced with specific cases, been mindful that, "The decisionmaking and public disclosure goals of §102(2)(C), though certainly compatible, are not necessarily coextensive."[22] In Weinberger v. Catholic Action of Hawaii, the U.S. Supreme Court examined a situation involving the possible storage of nuclear weapons at military installations. The U.S. Navy argued that the preparation and circulation of an EIS examining the impacts of such storage would force the disclosure of whether nuclear

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20. 5 U.S.C. §552(b).

21. 40 C.F.R. §1507.3(c).

22. Weinberger v. Catholic Action of Hawaii/Peace Ed. Project, 454 U.S. 139 (1981).

weapons would in fact be stored at the facility. The Supreme Court found that:

> "Due to national security reasons . . . the Navy can neither admit nor deny that it proposes to store nuclear weapons at West Loch. . . . Ultimately, whether or not the Navy has complied with NEPA "to the fullest extent possible" is beyond judicial scrutiny in this case. In other circumstances, we have held that 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated.' [omitting cites] We confront a similar situation in the instant case."[23]

Emergencies

The CEQ regulations provide that when emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the agency may proceed with the required action. Agencies must consult with CEQ at the earliest possible time (but not necessarily before taking the action made necessary by the emergency), and CEQ works with the agencies on a case by case basis to determine appropriate alternative arrangements for compliance with NEPA.[24] Most recently, the use of this regulation was upheld for actions taken in support of Operation Desert Shield and Operation Desert Storm.[25]

Timing

The CEQ regulations provide that the time periods normally required for interagency and public comment on draft and final EISs may be reduced "upon a showing by the lead agency of compelling reasons of national policy".[26] Other deviations from the normal 45 day comment period on a draft EIS and 30 day waiting period after publication of a final EIS are available if

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[23]. Id. at 146.

[24]. 40 C.F.R. §1506.11.

[25]. Valley Citizens for a Safe Environment v. Vest, 22 Envtl. L. Rep. 20,335 (D. Mass. 1991).

[26]. 40 C.F.R. §1506.10(d).

necessary to comply with other statutory requirements[27], or in the case of a supplemental EIS.[28]

<u>Foreign Policy Concerns and National Security Concerns</u>

Since 1976, the Agency for International Development (A.I.D.) has carried out its mission activities in conjunction with NEPA regulations which include exemptions for international disaster assistance; other emergency circumstances, and circumstances involving exceptional foreign policy sensitivities.[29] These regulations were issued as a part of a settlement from a lawsuit filed against A.I.D. by environmental organizations.

When faced with NEPA cases involving foreign policy or national security concerns, courts have been deferential to federal agency, both in determining whether NEPA has been violated and in fashioning remedies. This is particularly true when the action at issue is outside of the territorial United States. Although no court has held that NEPA does <u>not</u> apply to federal actions outside of the United States, they have uniformly striven to be sensitive to these concerns in examining the particular situation at hand.

For example, when faced with the question of whether NEPA applied to the Nuclear Regulatory Commission's decision to issue a nuclear export license for nuclear reactor technology to the Philippines, the D.C. Court of Appeals stated that NEPA:

contemplates exceptions for national security

> "looks toward cooperation, not unilateral action, in a manner <u>consistent with our foreign policy</u>. Moreover, if an EIS requirement attached to nuclear exports, there would be the spectre of litigation over the adequacy of the EIS, with delay the inevitable result. . . . I find only that NEPA does not apply to NRC nuclear export licensing decisions - and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad."[30] (emphasis added)

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27. 40 C.F.R. §1507.3(d)

28. 40 C.F.R. §1502.9(c).

29. 22 C.F.R. §216.2(b).

30. <u>Natural Resources Defense v. Nuclear Regulatory Commission</u>, 647 F.2d 1345, 1366 (1981).

In Greenpeace USA v. Stone[31], the court examined the application of NEPA to the removal of U.S. chemical munitions stored in the Federal Republic of Germany and transport of the munitions to Johnston Atoll across the oceans for subsequent destruction. The Army complied with NEPA for the destruction of the munitions on Johnston Island, a U.S. territory in the Pacific, and prepared environmental analysis pursuant to EO 12114 for analysis of environmental impacts of the transoceanic shipment of the munitions from the German port to Johnston Atoll. In reviewing the facts of the case, the court again demonstrated sensitivity to the foreign policy aspects of the scenario. The court stated that it "must" take into consideration the foreign policy implications of NEPA[32] and found that:

> "[t]he transoceanic movement of the munitions is a necessary consequence of the stockpile's removal from West Germany [and] implicates many of the same foreign policy concerns which affect the movement of the weapons through West Germany. . . ."[33]

? - Do upheld. just following E.O. here. Did any decision NEPA did not apply?

Finally, it is important to note that even in the face of NEPA violations, courts will not issue injunctions as a matter of course, but rather balance the NEPA violation "with the national well-being and security".[34] In an early NEPA case involving underground nuclear testing in Alaska, the D.C. Court of Appeals determined that the testing was subject to NEPA, but based on the complexity of the issues surrounding the testing, and the time it would take to resolve them, found that a ~~subsequent postponement~~ of the testing ~~would undermine~~ national security and foreign policy interests and thus denied the injunction.[35]

Similarly, in a case involving the Department of the Navy's Project ELF, an extremely low frequency submarine communications system, the Seventh Circuit Court of Appeals split on the

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31. 748 F. Supp. 749 (D. Hawaii 1990).

32. Id. at 759 (emphasis in original).

33. It is important to note that the court also stated that Executive Order 12114 could not "preempt application of NEPA to all federal actions taken outside the United States" (emphasis in original), but found that in this case, NEPA would not apply to the transoceanic routes because of the foreign policy considerations involved in the action. Id. at 763.

34. Wisconsin v. Weinberger, 745 F.2d 412, 425 (7th Cir. 1984).

35. The Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

question of whether the Navy was required to prepare a supplemental EIS. However, both the majority and dissent found that the lower court had erred in not balancing the equities of issuing an injunction with the program's "high priority for national defense". The court cited with approval an earlier case which stated that:

> "When a court has found that a party is in violation of NEPA, the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible, consistent with the broader public interest. . . . The court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction".[36]

The "Flint Ridge" Doctrine - Clear and Unavoidable Conflict

In Flint Ridge v. Scenic Rivers Association[37], the U.S. Supreme Court interpreted NEPA's mandate to comply with its requirements "to the fullest extent possible" to mean that an agency's responsibilities to fulfill the procedural requirements of NEPA would yield in cases of clear conflicting statutory requirements. In pertinent part, the Court stated that:

> "NEPA's instruction that all federal agencies comply with the impact statement requirement - and with all the other requirements of §102 - 'to the fullest extent possible,' 42 U.S.C. §4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. . . . Section 102 recognizes, however, that where a clear and unavoidable conflict exists, NEPA must give way. As we noted in United States v. SCRAP, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute."[38]

The "Rule of Reason

All NEPA cases are interpreted by the courts in light of the "rule of reason", a judicial device to ensure that common sense

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36. Wisconsin v. Weinberger, 745 F.2d at 426, citing Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005-06 (1981).

37. 426 U.S. 776 (1976).

38. Id. at 787 (emphasis added).

and reason are not lost in the rubric of regulation. The rule of reason has been cited in numerous NEPA cases, and is consistent with CEQ's interpretation of NEPA in both regulations and guidance.[39]

The Challenge of Standing

Recent court opinions have limited the ability of potential plaintiffs to bring NEPA lawsuits into court, particularly in cases where the area of interest is broad and geographically far away from plaintiffs' location and interests. In Lujan v. National Wildlife Federation,[40] the Court held that to demonstrate standing for purposes of NEPA[41], plaintiff must identify some final agency action that affects him or her and must show that he or she has suffered a legal wrong because of the agency action or is adversely affected by that action within the meaning of a relevant statute. In that case, the Court found that the National Wildlife Federation had shown insufficient adverse harm in connection with their members' use of public lands in the vicinity of land that was the subject of Bureau of Land Management orders that would open public land to mining activities.

In Foundation on Economic Trends v. Lyng[42], the D.C. Court of Appeals found that plaintiffs had not sufficiently identified a final agency action which adversely affected them in relationship to the Department of Agriculture's germplasm preservation program.

Finally, in Lujan v. Defenders of Wildlife[43], the U.S. Supreme Court found plaintiffs lacked standing to challenge the Interior Department's regulation which limited consultation regarding endangered species to the United States and the high

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39. See, for example, preamble to amendment to 40 C.F.R. §1502.22, 51 Federal Register 15625 (1986); Trout Unlimited v. Morton, 509 F.2d 1276, 1283 9th Cir. 1974); Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. 1973), citing Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 499 F.2d 1109, 1114 (D.C. Cir. 1971).

40. 110 S.Ct. 3177 (1990).

41. There is no private right of action for violations of NEPA; rather, plaintiffs bring suit under the Administrative Procedures Act.

42. 943 F.2d 79 (D.C. Cir. 1991).

43. 112 S.Ct. 2130 (1992).

seas. The Court again stressed the need for plaintiffs to show a likely injury in fact traceable to the challenged action, and one which could be addressed through a judicial remedy. Here, the court found that plaintiffs' travels to study various endangered species in foreign countries was insufficient to establish standing in respect to the issue of Endangered Species Act requirements for overseas actions.

These judicial interpretations of standing are particularly telling in the context of potential NEPA litigation for activities on the high seas or outer space. While not inconceivable that individuals or an organization could show standing, NEPA lawsuits for actions in the global commons would certainly not be, as has been suggested, available to anyone who wanted to sue. In fact, proving standing for impacts in either outer space or on the high seas would be significant challenge for potential plaintiffs.

Deference to agencies, resulting in few injunctions

In all NEPA litigation, federal courts demonstrate a high degree of deference to the defendant agency's determination regarding the significance of the environmental impacts and the adequacy of the analysis of those impacts.[44] Given that deference and the increased compliance of most federal agencies with NEPA and the CEQ regulations, the government wins by far the majority of NEPA cases. Thus, for example, in 1987, 69 NEPA lawsuits were filed and three injunctions were issued; in 1988, 91 lawsuits were filed and 7 injunctions were issued, and in 1989, 57 lawsuits were filed and 5 injunctions were issued. By far the largest number of injunctions occur where an agency has not prepared any analysis under NEPA, as opposed to a determination that such analysis is inadequate.[45]

APPLICATION OF NEPA TO ANTARCTICA IS CONSISTENT WITH THE INTERNATIONAL SCHEME FOR ENVIRONMENTAL PROTECTION IN ANTARCTICA, AND WITH THE APPLICATION OF OTHER US LAW TO ANTARCTICA.

Application of NEPA to U.S. activities in Antarctica is required, appropriate and consistent with other national and

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[44]. Depending upon the circuit and the precise nature of the claim, courts apply either an "arbitrary of capricious standard" or a standard of "reasonableness" to an agency's views and decisions. As the Supreme Court has noted, the differences in the two standards are difficult to discern. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)

[45]. Cumulative NEPA Litigation Survey, 1970-1991, 23rd Annual Report of the Council on Environmental Quality, 1992, pp. 164-168.

international obligations. Antarctica, not technically part of the "global commons"[46], enjoys a unique legal status in which the sovereignty claims of all nations, including the United States, are suspended and the activities of all countries are governed by the Antarctic Treaty.[47] Within that context, the National Science Foundation (NSF) maintains several scientific research installations, manages the research program, plans logistics and operations support for the U.S. Antarctic research program, and oversees implementation of this support by a civilian contractor and by other government agencies (i.e., the Naval Support Force Antarctica and the U.S. Coast Guard).

The U.S. government maintains considerable legislative and legal authority over activities taking place in U.S. facilities at Antarctica. For example, NSF has promulgated regulations under the Antarctic Conservation Act, including enforcement procedures, which govern the impacts by U.S. citizens, including tourists, on native species of Antarctica or its environment, and controls access to "specially protected areas" and "sites of special scientific interest."[48] The Department of Commerce has promulgated regulations under the Antarctic Marine Living Resources Convention Act of 1984[49], implementing the Convention on the Conservation of the Antarctic Marine Living Resources. Those regulations make it unlawful for any person to engage in harvesting, possessing, transporting or importing of certain Antarctic marine living resources.[50] By its terms, the regulations apply to the activities of the U.S. Antarctic Research Program. Other environmental statutes which are applied in Antarctica include the MARPOL Protocol to prevent pollution

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[46]. While Antarctica is characterized in EO 12114 as part of the "global commons", the State Department's Office of Legal Advisor has since advised that this is incorrect and that Antarctica is juridically distinguishable from the commons. The National Science Foundation also maintains that Antarctica is distinct from the global commons. "U.S. Antarctic Program Environmental Protection Agenda," Division of Polar Programs, National Science Foundation (August 31, 1988), p. 19.

[47]. Antarctic Treaty, signed in Washington, D.C., on December 1, 1959, T.I.A.S. No. 4780. The Treaty provides that no acts or activities taking place while the Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica. Article IV.

[48]. 45 C.F.R. §670.

[49]. 16 U.S.C. §2431 et seq.

[50]. 50 C.F.R. §380.

from ships[51]; the Endangered Species Act[52], the Marine Mammal Protection Act[53], the Migratory Bird Treaty Act[54], and the National Historic Preservation Act[55]. Legal provisions under these and other acts include the granting of jurisdiction of U.S. district courts over cases and controversies arising under certain laws in Antarctica[56], and the extension of jurisdiction over crimes committed in Antarctica[57]. The United States even treats income earned by citizens in Antarctica as income earned in the United States, rather than a foreign country.[58]

Application of NEPA is also completely consistent with the obligations recently undertaken by the United States through signing the Protocol on Environmental Protection to the Antarctic Treaty, which will enter into force after the 26 Consultative Parties have ratified it. Annex I of the Protocol sets forth requirements for environmental impact assessment which are consistent with NEPA. For reference, a comparison between the requirements of Annex I and NEPA is attached. (Attachment A).

Finally, as noted earlier, NSF, the Department of Defense and other agencies interpreted NEPA to apply to the Antarctica from NEPA's passage until the end of the 1970's. In fact, NSF prepared EISs for at least two projects in Antarctica during the 1970's, and the Department of State prepared an EIS for the Convention for the Conservation of Antarctic Seals, and for the Convention on Conservation of Antarctic Marine Living

any problems during this time?

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[51]. 33 U.S.C. 1901 et seq. (1987).

[52]. 16 U.S.C. §1531 et seq.

[53]. 16 U.S.C. §1361 et seq.

[54]. 16 U.S.C. §703 et seq.

[55]. 16 U.S.C. 470 et seq.

[56]. 16 U.S.C. §2410.

[57]. 18 U.S.C. §7(7); see also, 16 U.S.C. §1408.

[58]. 26 U.S.C. §863(d)(2)(A). It is true that the United States is currently arguing in the U.S. Supreme Court that the Federal Tort Claims Act (FTCA) does not apply to U.S. nations in Antarctica. However, the legal issue raised in that case involves the waiver of sovereign immunity for liability issues, which raises different concerns than those presented by NEPA, and much of the argument revolves around choice-of-law and venue provisions specific to the FTCA. See U.S. and Petitioner's briefs in <u>Smith v. United States</u>, No. 91-1538.

Resources.[59] Given this history, it is difficult to understand NSF's claim that implementation of NEPA would seriously endanger the U.S. Antarctic research.

SIMILARLY, APPLICATION OF NEPA TO THE GLOBAL COMMONS IS CONSISTENT WITH HISTORICAL INTERPRETATION OF NEPA, WITH THE APPLICATION OF OTHER ENVIRONMENTAL LAWS, AND WITH INTERNATIONAL LAW

Domestic Law

The global commons are areas which are not under the dominion of any sovereign nation - the high seas and outer space. As noted earlier, all interpretations of NEPA prior to the issuance of EO 12114 conceded that NEPA applied to the global commons. There is virtually no evidence that this interpretation caused any difficulties for any federal agency programs, activities or policies, or caused any conflict with any other national or international law, policy or obligation. why changed?

The absence of sovereignty in these areas eliminates the difficulties which the Foley doctrine was designed to address. Those concerned with NEPA's applicability abroad often point to the Supreme Court's recent decision in EEOC v. Arabian American Oil Co.[60] In that case, the Supreme Court held that Title VII of the Civil Rights Act of 1964 does not apply to the employment practices of U.S. firms that employ American citizens abroad. The facts of the case involved private employment occurring in Saudi Arabia, and the rationale of the opinion focuses on the problems of American law operating in a foreign country - not in the global commons.[61]

The Reagan and Bush administrations, in general, took a conservative view of the extraterritorial application of U.S. environmental law. Under President Reagan, the U.S. Fish and Wildlife Service reversed its earlier position on the requirements of the Endangered Species Act for consultation regarding the impact of proposed federal actions overseas on endangered and threatened species. However, even the 1986 Reagan

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[59]. Dry Valley Drilling Project, 38 Federal Register 23488 (August 30, 1973); Ross Ice Shelf Project, 39 Federal Register 39934 (November 12, 1974); Antarctic Seals Convention, 39 Federal Register 30169 (August 21, 1974); Antarctic Marine Living Resources Convention, with Annex (1982).

[60]. 111 S.Ct. 1227 (1991).

[61]. It may be worth noting that Congress explictedly overturned the Supreme Court's holding in this decision in the 1992 Civil Rights Act legislation.

regulations which provoked considerable litigation and public criticism ~~retained the consultation requirement for actions on the high seas~~. The Endangered Species Act specifically prohibits any person subject to U.S. jurisdiction from "taking" a species "upon the high seas"[62]. Similarly, the Marine Mammal Protection Act prohibits the taking of marine mammals on the high seas[63]. Both laws have considerably more substantive impact on federal activities and contain much more draconian provisions for enforcement than NEPA, yet neither the Defense Department nor other agencies have experienced notable difficulties in implementing these laws on the high seas.[64]

Further, those agencies which continue to apply NEPA to their activities have not experienced undue difficulty. The National Oceanic and Atmospheric Administration applies NEPA to both its implementation of the Endangered Species Act in the high seas, and the issuance of licenses and permits for deep seabed mineral exploration and recovery.[65] NOAA has recommended not appealing EDF v. Massey and NOAA representatives have stated that they have successfully implemented NEPA for deep seabed activities, even when protecting the location of particular sites to protect commercial interests.

The National Aeronautics and Space Administration (NASA) has applied NEPA to several proposed actions which would take place in the upper atmosphere or "outer space".[66] For example, in 1985, NASA prepared an environmental assessment and finding of no significant impact for the Combined Release and Radiation Effects

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62. 16 U.S.C. §1538.

63. 16 U.S.C. §1372.

64. In fact, the Endangered Species Act contains a specific exemption provision which can - but never has - been triggered at the request of the Secretary of Defense if he or she finds that such exemption is necessary for reasons of national security. 16 U.S.C. §1536(i).

65. The issuance of any licenses or permit for exploration and commercial recovery of hard mineral resources in the deep seabed is deemed to be a major Federal action significantly affecting the quality of the human environment. 30 U.S.C. §1419(d).

66. At present, there is no definitive boundary line between air and outer space. According to international customary law, outer space is the area in which artificial earth satellites move in durable orbit, and the area above this. Gorove, Pollution and Outer Space: A Legal Analysis and Appraisal, 5 NYU Journ. Int. Law & Pol. 53 (1972).

Satellite (CRRES) program.[67] The CRRES program involves the release of chemicals into the space environment to study the dynamic physical and chemical processes which are active in the upper atmosphere and space plasma environments. NASA prepared an EIS on the Ulysses Mission, an international cooperative mission between NASA and the European Space Agency to explore the sun and the heliosphere,[68] and on the Galileo Mission, to conduct comprehensive investigations of Jupiter's planetary system.[69]

Treaty Obligations

The High Seas

The United States has not signed the United Nations Convention on the Law of the Sea (LOS)[70], but, with the exception of the deep seabed mining provisions, has generally recognized the LOS as representing international and customary law. President Reagan declared the establishment of the U.S. Exclusive Economic Zone extending to a distance of 200 nautical miles from the baseline of the territorial sea. In the accompanying Statement on U.S. Oceans Policy, the President announced that the United States was prepared to accept and act in accordance with the balance of interests related to traditional uses of the ocean, including high seas uses.[71]

Law involving uses of the high seas generally has revolved around the freedom of nations to conduct navigation, overflights, fishing, scientific research in the high seas. Additionally, the rights of nations to lay submarine cables and pipelines and to construct artificial islands, installations and structures were recognized in the LOS.[72] None of these rights were impinged in any manner by the implementation of NEPA to U.S. activities in the high seas during the 1970's, nor would they be threatened by such compliance today. On the contrary, the LOS provides that nations have the "sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine

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67. 50 Fed. Reg. 41,964 (1985).

68. 54 Fed. Reg. 48,168 (1989).

69. "Supplemental Draft EIS for the Galileo and Ulysses Missions", November 1987.

70. United Nations Convention on the Law of the Sea, done at Montego Bay, Dec. 10, 1982, 21 I.L.M. 1261 (1982).

71. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

72. Articles 58 and 86.

environment."[73] More specifically, Section 4 of the LOS, "Monitoring and Environmental Assessment", provides that:

> "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments . . . . at appropriate intervals to the competent international organizations, which should make them available to all States."[74]

Further, nations have a duty to, as far as practicable, observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution on the marine environment. "In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."[75]

Outer Space

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, requires States to prevent disruption of the existing balance of the celestial bodies' environments through adverse changes of harmful contamination.[76] Nothing in either that Treaty nor other international agreements applicable to U.S. activity in outer space[77] appears to conflict with the implementation of NEPA. In fact, one legal writer, in

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[73]. Article 193 (emphasis added).

[74]. Articles 205 and 206.

[75]. Article 204. Strictly speaking, these provisions do not apply to government vessels. However, LOS Article 236 provides that each State shall ensure, by the adoption of appropriate measures, that such vessels or aircraft act in a manner consistent with these provisions. At any rate, it is clear that the implementation of NEPA would be consistent with the direction of the pertinent LOS articles.

[76]. Oct. 10, 1967, T.I.A.S. No. 6347, Article IX.

[77]. For example, the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, Apr. 27, 1968, T.I.A.S. No. 6599 and the Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, T.I.A.S. No. 7762.

analyzing various proposals to impose global environmental standards on activities in outer space, has written that:

> "A more politically palatable approach would be to adopt the U.S. NEPA on an international scale, requiring each nation to publish, in connection with each launch, a study of the environmental effects of the mission on the Earth and space, including a statement of how the satellite will be prevented from becoming a hazard to space travel. It has been proposed that the United Nations establish a legal requirement for 'preliminary ecological assessment' of space operations. This would be no additional burden on the United States, where NEPA already requires evaluation of environmental impacts upon the 'global commons' of the high seas, Antarctica, and outer space. Federal agencies, including the Defense Department and NASA, must file environmental impact statements on . . . . extraterrestrial activities of those agencies, such as the Space Shuttle."[78]

AGENDA 21, THE ACTION PLAN DEVELOPED AT THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, SUPPORTS THE APPLICATION OF NEPA TO ANTARCTICA AND THE GLOBAL COMMONS

While not hard law, Agenda 21 is indicative of the global consensus regarding environmental protection schemes. Application of NEPA to U.S. activities in the Antarctic and in the global commons is consistent with both the Rio Declaration and specific items in Agenda 21, including:

--- Ensuring the integration of economic, social and environmental considerations in decision-making at all levels and in all ministries;[79]

--- Ensuring access by the public to relevant information, facilitating the reception of public views, and allowing for effective participation;[80]

--- Adopting comprehensive analytical procedures for prior and simultaneous assessment of the impacts of decisions,

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78. Swenson, Major R., Pollution of the Extraterrestrial Environment, 25 Air Force L. Rev. 71, 85-86 [citations omitted] (1985).

79. Activity 8.4(a). It is worth noting that yet another difference between NEPA and EO 12114 is that NEPA requires consideration of social and economic impacts and how they intertwine with environmental considerations. EO 12114 addresses only environmental impacts.

NEPA arguably less draconian.

80. Activity 8.4(f).

including the impacts within and among the economic, social and environmental spheres; these procedures should extend beyond the project level to policies and programs; analysis should also include assessment of costs, benefits and risks;[81]

--- Adopting flexible and integrative planning approaches that allow the consideration of multiple goals and enable adjustment of changing needs; integrative approaches at the ecosystem or watershed level can assist in this approach.[82]

PUBLIC POLICY CONSIDERATIONS WEIGH ON THE SIDE OF APPLYING NEPA IN THE ANTARCTIC AND IN THE GLOBAL COMMONS

The Antarctic, the high seas and outer space are all remote and special ecosystems which need constant protection. Because of their very remoteness, environmental insults are less likely to be observed and addressed. However, the Antarctic environment has suffered from mankind's increasing presence on the continent, and, while the NSF has shown increasing awareness of the problem in the last few years, continual vigilance will be necessary to safeguard the continent's pristine nature.

Not a great deal is known about the impacts of U.S. military activities in the high seas[83]. Certainly, during the 1970's when DOD acknowledged that NEPA applied to activities in these areas, no major controversies appeared to have ensued. And, in fact, the most serious environmental degradation in the oceans appears to be taking place in coastal waters or the Exclusive Economic Zone, not the high seas. Nonetheless, in the high seas, aircraft carriers refuel at sea, drop fuel before landing on carriers, and wash aircraft on board ship with attendant run-off. Missiles are fired; air emissions emitted; solid waste dumped at sea. Long distan~~t~~ce transport of alien species within or among oceans has caused problems. The Navy has, at times, considered sea disposal for obsolete nuclear submarines containing significant levels of radioactivity, stimulating concern about long-term damage to marine ecosystems.

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81. Activity 8.5(b). The NEPA regulations specifically require assessment of policies and programs; EO 12114 does not.

82. Activity 8.5(c). Again, the NEPA regulations stress cumulative impact assessment; EO 12114 does not.

83. See excerpt, Norse, Dr. E., "Military use and immunity from public scrutiny" in Global Marine Biological Diversity Strategy, scheduled for release by Island Press, August, 1993. The Center for Marine Conservation, the World Conservation Union, World Wildlife Fund and the World Bank are sponsors of the development and publication of the strategy. The excerpt is included as Attachment B to this memorandum.

Even less is known about environmental insults to outer space; however, the need to know argues even more strongly from a policy perspective for application of NEPA. As stated by one author: "One thing is clear: in the campaign against pollution of the extraterrestrial environment, repairing damage to that environment is extremely difficult, if not impossible. The only reasonable alternative is prevention."[84]

One important question remains. The agencies involved in these activities may state that they are willing to do everything that NEPA would require them to do for activities in Antarctica, the high seas, and outer space. In that case, the argument is made: why subject the agencies to any risk of litigation at all? Why not simply issue an amended or new executive order mandating the most important elements of the NEPA process, but shielding the agencies from the threat of any delay due to lawsuits?

Clearly, this course is one of several alternatives which must be examined - and, at first blush, it appears less threatening and more attractive than conceding the statutory reach of NEPA over these agencies' activities. At issue, however, is whether the agencies will be obligated to undertake the environmental impact assessment process as a matter of <u>law</u> or as a matter of <u>policy</u>.

There is little doubt that if this administration issues a new executive order, agencies will take their political cue and begin implementation with some vigor. However, the executive order provides neither permanence nor enforceability. When President Reagan's administration came into power, even the scant coverage of EO 12114 was at issue, with some suggesting that it should be rescinded, which would have eliminated all analysis of for any federal action taking place outside of the U.S. Clearly, a stronger executive order would be even more vulnerable to a change of policy direction.

On the other hand, should a successor administration be less inclined to make dramatic policy shifts, but also be less interested in environmental issues than the Clinton/Gore administration, the political motivation for complying with an executive order would drop tremendously. In the long run, <u>only compliance under the law ensures continued motivation for environmental assessment</u>.

<u>Campaign commitment</u>

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[84]. <u>Op</u> <u>cit</u>. at n. 76.

During the campaign, Governor Clinton provided the following statements to the League of Conservation Voter's Presidential Profiles questionnaire:

"I support legislation to apply the National Environmental Policy Act to federal actions overseas.
U.S. agencies should be required to protect listed species overseas, just as they are required to do so in this country."

Both answers are consistent with only one outcome regarding the appeal of <u>EDF v. Massey</u>: to let the holding stand.

<u>Environmental Community</u>

Thirteen major environmental organizations, many of whom actively supported the Clinton/Gore campaign, have written to the President urging that <u>EDF v. Massey</u> not be appealed[85]. A decision to appeal this case will be interpreted as a retraction of a campaign commitment, and a foreshadowing of the administration's likely position on the issue of protection of endangered species abroad. Issuance of a new and improved executive order will not be viewed as an acceptable substitute for letting the law stand.

<u>Congress</u>

Members of Congress who have addressed the issue of NEPA abroad have repeatedly expressed dismay over past administration's narrow reading of the statute. Because of the Reagan and Bush administration's refusal to interpret NEPA to apply to overseas activities, amendments were introduced in the past three Congressional sessions to explicitly apply NEPA to all federal activities overseas, and to global environmental problems such as the loss of the ozone layer, climate change, and the loss of biological diversity.

Should the <u>EDF v. Massey</u> be appealed, it is highly likely that similar amendments to broaden NEPA's reach to <u>all</u> U.S. activities (not just those in Antarctica and in the global commons) will be reintroduced.

CONCLUSION

Federal agencies conceded that NEPA applied to U.S. activities in Antarctic and in the global commons during most of the 1970's, with virtually no discernable problems. Neither Congress nor the courts ever determined that this interpretation was incorrect; rather, all available evidence supports this

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[85]. The letter, dated March 1, 1993, is appended as Attachment C to this memorandum.

original interpretation. NEPA itself, CEQ implementing regulations, and applicable case law provides sufficient flexibility to meet exigencies, including foreign policy and national security concerns. Public policy interests weigh in favor of applying NEPA to federal activities in Antarctica and the global commons, and Clinton/Gore supporters and Congressional committees with jurisdiction over NEPA expect the administration to act according to campaign statements. For all of these reasons, the Department of Justice should be directed not to file a petition for rehearing in EDF v. Massey.

U.S. SETS OFF BLAST IN ANTARCTIC DUMP

Group Criticizes Explosives' Use to Destroy Chemicals

(6/05t on 12/30/91)

By MALCOLM W. BROWNE

Technicians at America's McMurdo Station in Antarctica have set off a powerful explosion to destroy a chemical dump, and the conservation organization Greenpeace yesterday accused the United States of endangering the Antarctic environment.

The blast, in which some 400 pounds of explosives were used to destroy a stockpile of discarded chemicals, took place on Ross Island near McMurdo Station on Dec. 30. The explosion left a crater about 40 feet wide and 10 feet deep and was felt up to 10 miles away.

Greenpeace's main complaint was that American technicians set off the explosion without having first conducted an environmental impact study.

Lawrence Rudolph, legal adviser to the National Science Foundation, acknowledged that such an assessment was not made and should have been. If a similar situation arises again, he said, "we should be more deliberate in conducting an environmental assessment, whenever possible."

A Major Cleanup Program

Because of widespread criticism of McMurdo's dumping practices, the National Science Foundation and the Navy began a major cleanup three years ago; discarded machinery, junk and drums of toxic waste that had accumulated for decades were shipped back to the United States for disposal.

But Mr. Rudolph said that in the current case the chemicals, discarded after use by a former scientific laboratory, were unstable peroxides and other sensitive substances that could easily explode. Such chemicals cannot be safely transported, he said, so it was decided to destroy them on the spot. No wildlife was in the area, he added.

Paul Bogart, the Washington representative of Greenpeace, said the group's main concern was that toxic chemicals might have been scattered over a wide area, with potentially serious consequences for wildlife. "The National Science Foundation continues to make decisions like the one that led to this explosion without putting anything on paper," he said.

Dana K. Harmon, a Greenpeace observer in Antarctica, asserted that "just months after signing the Environmental Protocol for Antarctica, the U.S. is found skulking about, blowing up dangerous chemicals and hoping that no one would notice."

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PRESS RELEASE

FOR IMMEDIATE RELEASE
March 6, 1992

Contact: Beth Marks
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ANTARCTIC COALITION CONDEMNS CHEMICAL EXPLOSION IN ANTARCTICA

WASHINGTON: The Antarctic and Southern Ocean Coalition (ASOC) released a letter today to the National Science Foundation condemning them for blowing up hazardous chemicals at a U.S. base in Antarctica. Seventy-five pounds of chemicals were destroyed using 3,200 pounds of explosives. "This is an outrage," said Beth Marks, Associate Director of The Antarctic Project. "No attempt was made to comply with the provisions of the recently signed Environmental Protocol, which requires an environmental assessment of all activities prior to their commencement."

The explosion, which took place five miles from the U.S. base at McMurdo Station, left a crater forty feet wide and ten feet deep. The surrounding area is now covered with fine ash. "NSF officials did not consider the possible environmental impacts of the explosion on the air, water or native wildlife," said Marks. "They also did not consider the safety measures to be taken during the removal of the chemicals."

This incident took place just three months after the signing of the Environmental Protection Protocol to the Antarctic Treaty. The Protocol, among other things, regulates all human activity with regard to its impact on the environment.

On October 4, 1991, the United States joined the other Treaty nations in signing the Protocol. President Bush, when announcing the intent of the US to sign, stated that "the protection of the Antarctic environment is an important international responsibility...."

"ASOC finds NSF's disregard for the protection of the Antarctic environment and its wildlife, and the agency's failure to uphold U.S. and international law regarding environmental assessment requirements, objectionable and embarrassing", said Marks. "This kind of ill-considered action calls into question the ability of NSF to carry out required environmental protection measures and to manage the U.S. Antarctic Program in a responsible manner."

ASOC is an international coalition of over 200 environmental organizations in almost fifty nations.